

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JESSE SHANE ALDERMAN,

Petitioner,

V.

PATRICK GLEBE,

Respondent.

No. 15-cv-0618-TSZ

ORDER

THIS MATTER comes before the Court on the Report and Recommendation (“R & R”) of the Honorable Mary Alice Theiler, United States Magistrate Judge, docket no. 14. Having reviewed the R & R and petitioner’s objections thereto, docket no. 15, the Court enters the following Order:

The only issue to which petitioner objects is the R & R's finding that he "has not shown that the evidence, when viewed in the light most favorable to him, supports an inference that he did not have sexual intercourse, as defined by the statute, with A.Z. In other words, the evidence does not support the inference that only attempted rape occurred." Petitioner's Objections to the R & R, docket no. 15, at 1. In essence, petitioner challenges only that his trial counsel was unconstitutionally deficient by not requesting a lesser included instruction. Even if petitioner's argument were correct, he would not be entitled to relief and thus the petition must be denied.

1 *Strickland* is a two-prong test, requiring that a petitioner demonstrate both
2 deficient performance and prejudice. *Crace v. Herzog*, 798 F.3d 840, 846 (9th Cir.
3 2015). The R & R found that petitioner failed to meet both *Strickland*'s performance and
4 prejudice prongs. Docket no. 14, at 16 & n.4. However, as noted above, petitioner has
5 challenged only the deficient performance finding. Assuming even that the R & R
6 incorrectly determined that counsel's performance was not deficient, petitioner does not
7 challenge its conclusion that there was not a reasonable probability that the jury would
8 have convicted him on the lesser charge. Accordingly, the petition for writ of habeas
9 corpus must be DISMISSED.

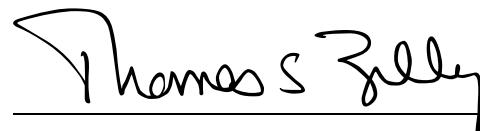
10 In light of the foregoing, the Court does not find that petitioner has made "a
11 substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3).
12 Thus, no certificate of appealability shall issue.

13 **Conclusion**

14 For the foregoing reasons, the R & R, docket no. 14, is ADOPTED in part and
15 MODIFIED in part. The Clerk is DIRECTED to enter judgment consistent with this
16 Order, to send a copy of this Order to all counsel of record and to Magistrate Judge
17 Theiler, and to CLOSE this case.

18 IT IS SO ORDERED.

19 Dated this 20th day of November, 2015.

20 
21

22 Thomas S. Zilly
23 United States District Judge